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Constitutional Law-Taxation

CONSTITUTIONAL LAW—TAXATION—The plaintiff engaged in the business of operating an automotive stage line over the highways between two points in California, carrying passengers, freight, the United States mail and parcel post. The state levied a tax of $2,978.78 for the year 1927 against plaintiff on gross receipts of $60,986.47 for 1926. Plaintiff paid half the first installment under protest and brought suit to recover $1,057.16, the portion of the tax assessed against the revenue derived from the carriage of the mails and parcel post. *Held,* judgment on demurrer for the defendant. *Alward v. Johnson,* Supreme Court of the United States, Feb. 24, 1931, 51 Sup. Ct. 273; 75 L. Ed. 354. (The opinion of the Supreme Court of California in this case may be found in 166 Cal. 244, 135, p. 971.)

The constitution of California divides all property within the state for taxation purposes into classes and provides for different burdens upon them. Sec. 15, Art. 13 of the Constitution provides for a tax on the gross earnings of persons (companies, corporations, etc.) engaged in the business of transporting persons or property, as a common carrier for compensation over any public highway within the state; and this section declares that that tax shall be in lieu of all other taxes and licenses, state, county, and municipal. The plaintiff's first contention is that this classification is unreasonable and discriminatory. A tax on gross receipts has repeatedly been upheld when in lieu of all other taxes. *Pullman Co. v. Richardson,* 261 U. S. 330, 43 Sup. Ct. 336; *United States Express Co. v. Minn.,* 223 U. S. 335, 32 Sup. Ct. 211; *Cudahy Packing Co. v. Minn.,* 246 U. S. 450, 38 Sup. Ct. 373. The Supreme Court appears to be committed definitely to the proposition that such a tax is a property tax. The method of reasoning is something like this: by the systemization and unification of properties used by a public service, or any other business, these properties acquire in the aggregate a special value by virtue of this unity to use. This special value is in the nature of property. A fair tax on gross earnings bears such a relation to the value of these properties under their unity of use as to justify it as being a legal and commutated or substituted tax for other taxes which were or might have been levied. *Maine v. Grand Trunk Ry.,* 142 U. S. 217, 12 Sup. Ct. 121; *Adams Express Co. v. Ohio,* 165 U. S. 194, 17 Sup. Ct. 305; *United States Express Co. v. Minn., supra.* From the beginning the California courts have treated the tax on gross receipts as one on property. *San Francisco v. Pacific T. & T. Co.,* 166 Cal. 244, 135 Pac. 971; *Pacific Gas & Elect. Co. v. Roberts,* 168 Cal. 420, 143, p. 700. In the latter case the court said: ". . . a small amount in value of . . . property could, by use in business, bring in returns by way of revenue greatly in excess of the separate value of the properties employed. This earning capacity . . . had a value which should be taxed, and no better method of taxing it was apparent than that which levied a percentage upon the gross revenue returns." The fact that the California constitution specifically provides that this tax shall be in lieu of all other taxes and shall be only on receipts

earned entirely within the state makes it more clearly a property tax, and forestalls any question of interference with interstate commerce. At first the United States Supreme Court hesitated to declare that a percentage tax upon gross earnings of a corporation was in any true sense identical with an ad valorem tax upon the properties of the corporation. Since the United States Supreme Court has overcome this "hesitancy," *Pullman Co. v. Richardson, supra;* and it is certain that the court has had little doubt about upholding the tax under the due process clause, for "by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor . . . it is not open to attack as inconsistent with the constitution." *Galveston, etc. Ry. Co. v. Texas,* 210 U. S. 227, 28 Sup. Ct. 640. The classification which makes the plaintiff subject to this particular tax is not arbitrary or unreasonable. *Berkins Van Lines v. Riley,* 280 U. S. 80, 28 Sup. Ct. 640. The court pointed out that the distinction between property employed in conducting a business which requires constant and unusual use of the highways and property not so employed is plain enough.

Plaintiff's second contention was that the tax being partly upon earnings derived from carrying the United States mail and parcel post was a tax on a federal agency and hence illegal. The taxing power of the state is one of its attributes of sovereignty; it exists independently of the constitution of the United States, and may be exercised to an unlimited extent, except so far as it has been surrendered to the federal government. *Union Pac. R. R. Co. v. Peniston,* 18 Wall. 5, 21 L. Ed. 787. In this case it was decided that the property of the Union Pacific R. R. although it was a corporation created by Congress and an agent of the general government, designed to be employed and actually employed in the legitimate service of the government, both military and postal, and not exempt from state taxation. And the court held that the exemption of agencies (and property) of the federal government from taxation by the states is dependent, not upon the nature of the agents (or property), nor upon the fact that they are agents, but upon the effect of the tax; that is, whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or hinder the efficient exercise of their power. ". . . not every person who uses his property, or derives a profit in his dealings with the government, may clothe himself with immunity from taxation on the theories that either he or his property is an instrumentality of government. . . . Taxation by either the state or the federal government affects in some measure the cost of operation of the other." *Metcalf & Eddy v. Mitchell,* 269 U. S. 514, 46 Sup. Ct. 172. Where the federal government conveyed land to a corporation for dry dock purposes, reserving the right to free use of the dock, it was held that land was not exempt from state taxation, the court expressing the opinion that it would be "extravagant to say that an independent private corporation for gain, created by a state, is exempt from taxation either in the corporate person, or its property, because it is employed by the United States even if the work for which it is employed is important and takes much of its time." *Baltimore Shipbuilding Co. v. Baltimore,* 195 U. S. 375, 25 Sup. Ct. 50. Some cases which have held that the property was exempt, since it was a governmental agency or closely affected by the interest of the federal government, so that to tax it would be

an interference with the government, are *Pollock v. Farmers Loan & Trust Co.*, 157 U. S. 429, 15 Sup. Ct. 673, which involved the obligations of the federal government sold to raise public funds; *Ambrosini v. United States*, 187 U. S. 1, 23 Sup. Ct. 1, where surety bonds were exacted by the state government in the exercise of its police power; and *Gillespie v. Oklahoma*, 257 U. S. 501, 42 Sup. Ct. 171, a strict case, which decided that when the instrumentality is so intimately connected with the necessary functions of the government as to fall within the exemption, the immunity extends to the income derived from the instrumentality. In *Panhandle Oil Co. v. Miss.*, 277 U. S. 218, 48 Sup. Ct. 451, it was decided that a state tax on gasoline sold by dealers was illegal so far as it applied to gasoline sold by those dealers to the United States coast guard fleet and to the United States Veterans' Hospital. In this opinion the court said: "The states may not burden or interfere with the exertion of national power or make it a source of revenue or take the funds raised or tax the means used for the performance of federal functions. . . . While Mississippi may impose charges upon petitioner for the privilege of carrying on trade that is subject to the power of the state, it may not lay any tax upon transactions by which the United States secures the things desired for its governmental purposes." Mr. Justice Holmes, together with three other justices, dissented: "When the government comes into a state to purchase I do not perceive why it should be entitled to stand differently from any other purchaser. The question of interference with government is one of reasonableness and degree and it seems to me that the interference in this case is too remote." Certainly this is a borderline case difficult to reconcile with the principal case, for in each the interference seems equally remote. In the principal case, however, the court did not seem to have much difficulty in perceiving this, for speaking through Mr. Justice McReynolds, who dissented in the Panhandle case, it said: "There was no tax on the contract for such carriage (of the mails); the burden laid upon the property employed affected operations of the federal government only remotely." J. W. S.